

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

PUBLIC VERSION – REDACTED

May 15, 2017

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **In the Matter of Liberman Broadcasting, Inc. and LBI Media, Inc. v. Comcast Corporation and Comcast Cable Communications, LLC – MB Docket No. 16-121; File No. CSR-8922-P**

Dear Ms. Dortch,

On May 11, 2017, representatives from and counsel to Liberman Broadcasting, Inc. and LBI Media, Inc. (“LBI”) and Comcast Corporation (“Comcast”) met with representatives from the Media Bureau and the Office of General Counsel. The meeting was attended by:

- Lenard Liberman and Cathy Lewis of LBI;
- Chris Bjornson, Matthew Friedman, and I from Steptoe & Johnson LLP, counsel to LBI;
- Frank Buono and Michael Nissenblatt from Comcast;
- Michael Hurwitz from Willkie Farr & Gallagher LLP and Jay Cohen from Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel to Comcast;
- MaryBeth Murphy, Martha Heller and Raelynn Remy from the Media Bureau; and
- Susan Aaron from the Office of General Counsel.

During the meeting, LBI, Comcast, and their counsel responded to questions posed by the Media Bureau in advance of that meeting, as well as questions posed at the meeting. This letter details LBI’s responses, and it more fully responds to the Media Bureau’s specific questions.

LBI's EstrellaTV is a nationally distributed Spanish language television network. It is distributed in all 210 television markets in the United States.

EstrellaTV's programming is distributed in three ways. Specifically, it is distributed by owned-and-operated ("O&O") broadcast stations, affiliated broadcast stations, and by multichannel video programming distributors ("MVPDs") in so-called "white areas," where an EstrellaTV broadcast signal does not exist.¹ In some cases, even where an EstrellaTV broadcast signal exists, EstrellaTV is nonetheless carried by an MVPD on both a broadcast tier and a Hispanic programming "cable tier."

The Media Bureau's August 2016 Memorandum Opinion and Order² focused on EstrellaTV's status as a broadcast television station when it dismissed, without prejudice, EstrellaTV's April 8, 2016 Complaint. This decision was wrong as a matter of law, as explained in our Petition for Reconsideration and Reply to Comcast's Opposition to the Petition for Reconsideration.

The *MO&O* also focuses on the volitional element of EstrellaTV's distribution of programming. The *MO&O* states that LBI may file a program carriage complaint "to the extent Estrella TV *acts* as a non-broadcast network..."³

Neither the *MO&O*'s focus on EstrellaTV's *status* as a broadcaster, nor in how it *acts* to distribute its programming, disqualifies EstrellaTV from qualifying as a video programming vendor under Section 616 of the Communications Act. Further, the binary, artificial distinction

¹ LBI used the term "white areas" to refer to markets where there is neither an EstrellaTV O&O nor an EstrellaTV affiliate. See Complaint ¶ 37. This differs from prior Commission usage of the term, which focuses on whether the population in an area receives any broadcast signal, and not the signal of a particular station. See *KVMD Licensee Co., LLC c/o Barry A. Friedman, Letter*, 23 FCC Rcd. 15748, 15749 n.8 (2008) ("The Commission defines a television 'white area' as an area where the population does not receive *any* over-the-air television service," while a "gray area" is "where the population receives only one over-the-air television service.") (emphasis added).

² *Liberian Broadcasting, Inc. and LBI Media, Inc. v. Comcast Corporation and Comcast Cable Communications, LLC*, *Memorandum Opinion and Order*, 31 FCC Rcd. 9551 (2016) ("*MO&O*").

³ *Id.*, 31 FCC Rcd. at 9560 n.7 (emphasis added). Even under the *MO&O*'s volitional test, LBI's Complaint established a *prima facie* case for standing as a video programming vendor because LBI *acts* as a non-broadcast network when providing its programming via satellite transmission to MVPDs. See *infra* 6-7, 9, 12.

created by the *MO&O* does not reflect the reality of how EstrellaTV actually delivers its programming. In fact, EstrellaTV and Telemundo deliver their programming identically, via O&O broadcast stations, affiliate broadcast stations, and in white areas.⁴ The division of each distribution category is similar:

EstrellaTV: [REDACTED] O&O Markets
[REDACTED] Affiliate Markets
[REDACTED] White Area Markets⁵

Telemundo: [REDACTED] O&O Markets
[REDACTED] Affiliate Markets
[REDACTED] White Area Markets⁶

As shown above, the vast majority of both networks' distribution is in white area markets. A comparison of Comcast's distribution of EstrellaTV relative to Charter's distribution is illustrative:

EstrellaTV Subscribers by MVPD ⁷			
MVPD	O&O Station Broadcast Areas	Affiliate Station Broadcast Areas	White Areas
Comcast	[REDACTED]	[REDACTED] ⁸	[REDACTED]
Charter	[REDACTED]	[REDACTED]	[REDACTED]

As shown above, in white areas Charter distributes EstrellaTV to approximately [REDACTED] subscribers. Of course, Comcast distributes EstrellaTV to [REDACTED] subscribers. In contrast, Comcast distributes Telemundo to [REDACTED]

⁴ See Complaint ¶ 37.

⁵ See Package Subscribers by Network, SNL KAGAN, <https://www.snل.com/web/client?auth=inherít#industry/mediaCensusWrapper?ReportID=ec28bb11-7386-4081-9ad0-1eb6542361b9> (Set "Network" to "Estrella TV" and "Package Type" to "Buy Through").

⁶ See *id.* (Set "Network" to "Telemundo" and "Telemundo (Sat Direct)" and "Package Type" to "Buy Through").

⁷ See *id.* (Set "Network" to "Estrella TV" and "Package Type" to "Buy Through").

⁸ Comcast only distributes EstrellaTV to these [REDACTED] subscribers because LBI has separate agreements with the affiliate stations, not because Comcast has reached an agreement with LBI.

approximately [REDACTED] subscribers in white areas on Comcast's system.

Telemundo Subscribers by MVPD ⁹			
MVPD	O&O Station Broadcast Areas	Affiliate Station Broadcast Areas	White Areas
Comcast	[REDACTED]	[REDACTED]	[REDACTED]
Charter	[REDACTED]	[REDACTED]	[REDACTED]

LBI delivers its satellite feeds to MVPDs in an identical manner to cable networks that are not distributed through any broadcast station. Specifically, LBI transmits EstrellaTV's programming over fiber from its Burbank, CA headquarters to Dallas, TX, where it is uplinked to the Galaxy 23 satellite, operated by Intelsat, using a C-band satellite transmission. EstrellaTV's programming is then sent back to Earth, to the master headends of cable and DBS MVPDs. At each headend, EstrellaTV's feed is demodulated and encoded to be available on the MVPD system.

Significantly, if EstrellaTV's O&O and affiliate broadcast signals stopped transmitting today, EstrellaTV still would be distributed to all 210 television markets in the United States.

LBI's Complaint and Reply to Comcast's Answer establish a *prima facie* case that "Estrella TV 'provides video programming that is similarly situated to video programming provided by' Telemundo and NBC Universo, 'based on a combination of factors,' including genre, ratings, and target audience, advertisers, and programming."¹⁰ This *prima facie* case comparing EstrellaTV to Telemundo and NBC Universo applies to all markets where Comcast distributes Telemundo and NBC Universo. EstrellaTV programming is identical nationwide, and it is available anywhere a MVPD distributes programming. EstrellaTV, Telemundo and NBC Universo each is a general interest, Spanish language network that airs a mix of substantially overlapping, broadly defined programming genres¹¹ and targets the same U.S. Hispanic viewer

⁹ See *id.* (Set "Network" to "Telemundo" and "Telemundo (Sat Direct)" and "Package Type" to "Buy Through").

¹⁰ Complaint ¶ 24 n.41.

¹¹ *Id.* ¶ 24 ("That is: (i) all three networks are Spanish language; (ii) Telemundo and Estrella TV each offers a closely comparable mix of programming that includes news, sports, reality, talk, drama, and comedy programming targeting the same audience and advertisers; and (iii) NBC Universo offers a programming mix similar to Telemundo and Estrella TV, but without news."); Reply ¶¶ 59 ("Estrella TV, Telemundo, and NBC Universo, are general interest Spanish-language networks airing a constantly evolving mix of substantially overlapping broadly defined
(Continued...)

pool.¹² Each targets and shares many of the same large advertisers.¹³ EstrellaTV receives similar or better ratings when allowed to “enjoy[] distribution comparable to that of Telemundo and NBC Universo.”¹⁴

The Los Angeles television market is the most important Spanish language market in the United States.¹⁵ It provides a useful apples-to-apples comparison of how the Spanish language programmers compete head-to-head. And, distribution of these programmers in the Los Angeles market is roughly equal.

Consequently, the Los Angeles television market serves as a useful proxy for how EstrellaTV compares to Telemundo. And in that market, EstrellaTV is the only Spanish language programmer that beats Telemundo’s ratings, other than Univision.¹⁶ In fact, EstrellaTV, Univision and Telemundo compete fiercely for viewers. The white areas, on the other hand, are not useful for ratings comparisons, because as a result of Comcast’s unlawful refusal to carry EstrellaTV, Telemundo’s distribution is significantly broader than EstrellaTV’s distribution.

programming genres to target the same U.S. Hispanic viewer pool in a fiercely competitive marketplace.”), 62 (“Estrella TV, Telemundo, and NBC Universo are all similarly situated general interest, mass appeal Spanish language networks which compete for viewers’ attention and allegiance with evolving and differing mixes of largely overlapping program genres.”).

¹² Complaint, Exh. 12.

¹³ *See id.* (shared advertisers include MetroPCS, Ford, Mars, AT&T, Anheuser Busch, Colgate, Clorox, Constellation Brands, Dish, L’Oréal, General Motors, Procter and Gamble, Miller Coors, and Samsung).

¹⁴ *Id.* ¶ 25 (“Within the U.S. Spanish language video universe, in markets where the playing field is level, namely where Estrella TV enjoys distribution comparable to that of Telemundo and NBC Universo, Estrella TV programming competes with demonstrable success against the Hispanic Networks in general and the two Comcast-owned Spanish language networks in particular. In such markets, Estrella TV also substantially outperforms the large majority of its other Spanish language competitors.”).

¹⁵ *Id.* ¶ 28 (Los Angeles is “the single most important ratings crucible,” where EstrellaTV, Univision, UniMas, Telemundo, Azteca, and MundoMax are broadly distributed by many MVPDs).

¹⁶ *Id.* ¶ 29 (EstrellaTV’s

In addition, EstrellaTV provided evidence of its favorable comparison to Telemundo in Dallas, the fifth-ranked Hispanic market, [REDACTED]

[REDACTED] This “confirm[s] that, where networks are on an equal footing, Estrella TV is a staunch competitor to Comcast-owned Telemundo.”¹⁷

Additionally, despite NBC Universo’s much broader distribution than EstrellaTV’s,¹⁸ EstrellaTV substantially outperformed NBC Universo in a national ratings comparison.¹⁹

The *MO&O* curiously stated that EstrellaTV’s “feed” does not qualify as a video programming vendor.²⁰ A video programming vendor is by definition, of course, a “person.”²¹ It cannot by definition, therefore, be a “feed,” “signal,” or transmission.”²² A video programming vendor can never be an inanimate distribution method or electrons distributed by satellite or transmitter. Instead, when LBI distributes EstrellaTV’s satellite feed, it operates “in its capacity as a non-broadcast network.”²³ Like cable networks, it has no must carry rights in white areas where there is no broadcast signal.²⁴ LBI, accordingly, lacks the ability to bring a

¹⁷ *Id.* ¶ 30.

¹⁸ *Id.* ¶ 61 (Comcast’s “rebrand” of NBC Universo included “granting NBC Universo wide carriage and support across Comcast’s huge national MVPD platform.”).

¹⁹ *See id.* ¶ 34 [REDACTED]

Exh. 18.

²⁰ *MO&O*, 31 FCC Rcd. 9560 n.77.

²¹ *See* 47 U.S.C. § 536(b).

²² 47 U.S.C. § 153(39) (defining “person” to include “an individual, partnership, association, joint-stock company, trust, or corporation”).

²³ *MO&O*, 31 FCC Rcd. 9560 n.77.

²⁴ Petition for Reconsideration at 11-12 (Cable only networks “do not have the ability under the statute to seek carriage on a retransmission consent or must-carry basis. The result would be that such cable-only networks would have no protection under the Act even in the face of clear discriminatory behavior.”).

complaint for failure of a MVPD to negotiate in good faith in such areas.²⁵ Any conclusion by the Bureau that LBI is not a video programming vendor when it distributes its satellite feed to MVPDs for distribution would entirely strip LBI of any possible remedy against unlawful MVPD behavior, giving MVPDs carte blanche to discriminate against and negotiate in bad faith with LBI.

Contrary to Comcast's description of white area distribution as less meaningful distribution than other areas, the statistics state the opposite is true. [REDACTED] They are not a "fill-in" to service for markets adjunct to EstrellaTV's broadcast areas. LBI bargained hard for distribution in white areas. [REDACTED]

LBI sought broad white area distribution, not just in areas ancillary to EstrellaTV's broadcast areas, but in "each [Comcast system] which does not receive a good quality signal of" an EstrellaTV broadcast station.²⁸ [REDACTED]

Comcast counsel's contentions that the record does not establish that MVPDs pay LBI to distribute EstrellaTV's feed in white areas, meanwhile, is a non-sequitur. [REDACTED]

²⁵ See 47 C.F.R. § 76.65(b).

²⁶ Complaint ¶ 56 (Comcast "refuses LBI fair and critically important distribution comparable to that enjoyed by Comcast-owned Telemundo and NBC Universo," which receive national, white area distribution).

²⁷ *Id.*, Exh. 19 (November 18, 2014 Estrella TV Proposal to Comcast, attached to November 18, 2015 Email from Jake Martinez to Michael Nissenblatt, [REDACTED])

²⁸ *Id.*

²⁹ *Id.* (January 23, 2015 Email from Michael Nissenblatt to Jake Martinez, stating [REDACTED])

³⁰ *Id.* (February 1, 2015 Estrella TV Proposal to Comcast, attached to February 1, 2015 Email from Jake Martinez to Michael Nissenblatt).

[REDACTED] Second, Comcast's refusal to broadly distribute EstrellaTV in a comparable manner to Telemundo, alone, constitutes actionable discrimination against EstrellaTV on the basis of affiliation. Comcast's refusal to carry EstrellaTV in the white areas directly benefits Comcast's Spanish language affiliate networks, to the detriment of EstrellaTV, by removing a top competitor. Indeed, Comcast recently recognized EstrellaTV's value when it blasted a Telemundo advertisement acknowledging EstrellaTV's 15% growth in Nielsen ratings from the periods of September 21, 2015 to March 27, 2016, and September 19, 2016 to March 25, 2017.³¹

Comcast's argument that only markets outside the Top 40 Spanish language markets can be considered white areas is wrong. EstrellaTV's white areas, as the term is used in this proceeding, are the markets where its broadcast feed is not distributed. [REDACTED]

[REDACTED] But without broad distribution in these and other white areas, LBI is greatly hindered in its ability to generate ratings.³³ Lesser ratings, in turn, lead to lesser advertising revenue and lesser distribution that harms EstrellaTV's ability to compete.

In response to a Media Bureau question, EstrellaTV made clear that a finding that EstrellaTV's Complaint gives it standing in white areas, even if the Bureau affirms the *MO&O* relative to broadcast areas, would be valuable to EstrellaTV. In any such proceeding before the Administrative Law Judge, EstrellaTV's requested remedy would be that the Commission order Comcast to provide carriage to EstrellaTV on similar terms as Telemundo. This may mean that the remedy include distribution in broadcast areas, depending on how the facts of the case unfold.

Below, we address each specific question posed by the Bureau in detail.

³¹ See Press Release, NBCU Hispanic Group, Shift Happens (Apr. 19, 2017) (attached hereto as Exhibit 1).

[REDACTED]

³³ Complaint ¶ 26 ("MVPDs *and* broadcasters tasked with deciding which programming networks to carry rationally strive to find unique programming that viewers want to watch, a reasoned instinct premised on the simple proposition that audience ratings drive value... [W]here a channel is already operational, success is most readily judged by consulting Nielsen ratings.").

- 1. Describe the satellite feed that LBI would like Comcast to provide in white areas. What programming is included on the feed? Is the content of the feed the same in all markets, or does it vary depending on the market? Do any other MVPDs currently carry the feed in white areas?**

Response: LBI provides two EstrellaTV programming satellite feeds to MVPDs, which MVPDs then distribute to their customers in EstrellaTV's white areas, as well as in EstrellaTV's broadcast areas. These feeds are (1) an East coast feed and (2) a West coast feed.³⁴ MVPDs distributing these EstrellaTV feeds, including in the white areas, include AT&T, DIRECTV, Dish Network, Charter, Verizon, MediaCom, Century Link, and Frontier. AT&T, DIRECTV, Dish Network, and other major MVPDs also use these satellite feeds to provide service to the areas where EstrellaTV is provided through an O&O or affiliated broadcast station.

EstrellaTV has [REDACTED] O&O broadcast stations.³⁵ In addition, EstrellaTV is affiliated with [REDACTED] broadcast stations.³⁶ An affiliate station is a broadcast station owned by a company other than LBI. Owners of affiliate stations distributing EstrellaTV include Hearst, Nexstar, Sinclair, and Tegna.³⁷ Finally, EstrellaTV also is distributed in [REDACTED] white area markets, where there is no over-the-air broadcast signal.

³⁴ Dish Network, DIRECTV, Charter, and other major MVPDs carry EstrellaTV's national satellite feed and its local broadcast feeds.

³⁵ See *id.*, Exh. 3. [REDACTED]

³⁶ See *id.* [REDACTED]

³⁷ *Id.* ¶ 5 ("Successful, expanded distribution of Estrella TV has taken multiple forms on multiple fronts over time, from LBI's securing Estrella TV broadcast affiliates beginning in 2008 that today include many industry-leading, experienced, and successful broadcast companies (e.g., Hearst, Nexstar, Sinclair, and Tegna . . .)").

³⁸ Exhibit 2 to this filing details carriage of EstrellaTV by market, including type of distribution and whether EstrellaTV's feed is carried by AT&T, Comcast, Charter, DIRECTV, Dish Network or Verizon. These subscriber statistics were taken from SNL Kagan's Subscriber by Network database. See Package Subscribers by Network, SNL KAGAN,

EstrellaTV's carriage on Charter's cable service is illustrative. Charter distributes EstrellaTV to approximately [REDACTED] subscribers.³⁹ Of these, [REDACTED] subscribers are in EstrellaTV's O&O broadcast areas; [REDACTED] are in affiliated broadcast areas; and [REDACTED] are in white areas.

In comparison, Comcast today distributes EstrellaTV's programming to [REDACTED] subscribers. Of these, [REDACTED] subscribers are in EstrellaTV's O&O broadcast areas; [REDACTED] subscribers are in affiliated broadcast areas; and, of course, [REDACTED] subscribers are in white areas.

EstrellaTV Subscribers by MVPD ⁴⁰			
MVPD	O&O Station Broadcast Areas	Affiliate Station Broadcast Areas	White Areas
Comcast	[REDACTED]	[REDACTED]	[REDACTED]
Charter	[REDACTED]	[REDACTED]	[REDACTED]

LBI seeks carriage by Comcast of its East and West coast satellite feeds for distribution to white areas and to EstrellaTV's broadcast areas.

EstrellaTV delivers its satellite feeds to MVPDs in the same manner as cable programmers, such as CNN, deliver their satellite feeds. Specifically, LBI transmits EstrellaTV's programming from its Burbank, CA headquarters, where the programming has been produced and created, to Dallas, TX via a fiber optic cable, where it is uplinked to the Galaxy 23 satellite, operated by Intelsat, using a C-band satellite transmission. EstrellaTV's feed is then sent back to Earth, to the master headends of each MVPD distributing EstrellaTV. At each headend, EstrellaTV's feed is demodulated and encoded to be available on the MVPD's digital lineup.

<https://www.snl.com/web/client?auth=inherit#industry/mediaCensusWrapper?ReportID=ec28bb11-7386-4081-9ad0-1eb6542361b9> (Set "Network" to "Estrella TV" and "Package Type" to "Buy Through").

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ Comcast only distributes EstrellaTV to these [REDACTED] subscribers because LBI has separate agreements with the affiliate stations, not because Comcast has reached an agreement with LBI.

EstrellaTV's East and West coast satellite feeds carry identical programming in all markets, with the West Coast feed three hours behind the East coast feed. Any variation that appears to the viewer consists of local news programming that may be inserted in certain markets as well as interstitial advertisements by the MVPD, which is standard industry practice.

- 2. Identify those aspects of the existing record that establish that LBI satisfies the following elements of a *prima facie* case of discrimination:**
 - a. Does LBI's provision of a satellite feed in white areas render it a "video programming vendor" in those areas? See 47 CFR § 76.1302(d)(1).**

Response: It is the vending of video programming that renders LBI a video programming vendor everywhere its programming service is offered. While LBI distributes a satellite feed that is distributed in the white areas, it is a video programming vendor in all areas. As a statutory matter, the technical manner in which LBI delivers EstrellaTV's programming to MVPDs is irrelevant.

Plain Language of the Communications Act

First, under the plain language of the Communications Act in Sections 602 and 616, the definition of Video Programming Vendor includes a broadcast station, and the manner of the feed is irrelevant. The definition of video programming vendor applies both to the white and broadcast area feeds. A video programming vendor is "a person engaged in the production, creation, or wholesale distribution of video programming for sale."⁴² And "LBI produces, creates, *and* distributes on a wholesale basis video programming for sale," meeting all three prongs of the definition when it needs to meet only one.⁴³ For example, LBI creates and produces approximately 75 percent of its own programming at its own studios, which it then sells and distributes through O&O stations, affiliate stations, and many MVPDs.⁴⁴ This programming is distributed by MVPDs in both EstrellaTV's broadcast and white areas.

⁴² 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e); Petition for Reconsideration at 4; *see* Applications of Comcast Corporation, General Electric Company and NBCU Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4358 (2011) ("*Comcast-NBCU Order*").

⁴³ Complaint ¶ 7.

⁴⁴ *See id.* ¶ 4 ("Estrella TV programming is today a unique aggregation of Spanish language programming (which includes national and local news shows as well as sports, variety, talk, reality, drama, music, and comedy programming), some 75 percent of which is produced by LBI at its headquarters in Burbank, California, by an overwhelmingly Hispanic workforce numbering approximately 1,000."); Reply ¶ 15 ("LBI is a quintessential VPV because it creates and

(Continued...)

Additionally, this programming is “video programming.” Video programming was unambiguously defined by Congress as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁴⁵ The programming provided by EstrellaTV necessarily meets this definition in all markets where it is distributed, and this statutory definition provides no basis for differentiating the EstrellaTV programming when provided in broadcast areas from the identical programming provided in white areas.

Similarly, the record establishes that this programming was made “for sale” in all areas. As with all past program carriage complaints, LBI sought compensation from Comcast in exchange for making EstrellaTV’s video programming available.⁴⁶ LBI sought compensation for both its signal and its content, in both the broadcast areas and the white areas.⁴⁷ Even if the Bureau reaffirms its finding that LBI sought compensation only for its signal in the broadcast areas because “the video programming content transmitted by television broadcast stations is governed by the compulsory copyright license,”⁴⁸ such a finding cannot apply to the white areas or broadcast areas where EstrellaTV is not distributed through a full power broadcast station, where the compulsory license is unavailable.

produces some 75 percent of its own programming at its own studios in Burbank, California, programming which it sells/distributes through owned stations, many affiliates, and many MVPDs.”).

⁴⁵ 47 U.S.C. § 522(20); Complaint ¶ 8 (“That same Appendix A specifies that “Video Programming” “means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network”); Petition for Reconsideration at 4 (“In Section 602, Congress unambiguously defined the term ‘video programming’ as ‘programming provided by ... a television broadcast station.’”); *see Comcast-NBCU Order*, 26 FCC Rcd. at 4358.

⁴⁶ *See* Petition for Reconsideration at 10-11 (“Similarly, the genesis of the underlying complaint before the Commission is Comcast’s refusal to pay LBI money in exchange for being able to carry Estrella TV content. There is no dispute over this fact.”).

⁴⁷ *See id.* at 11-13 (“And in electing retransmission consent in lieu of must carry in its broadcast markets, LBI sought to sell both its contents and its signal to Comcast. . . . In any event, LBI clearly sought compensation for its content in non-broadcast markets, where statutory royalties are not available.”).

⁴⁸ *MO&O* ¶ 12.

Commission Precedent

Commission precedent also supports this plain meaning of video programming vendor. Shortly after the passage of the 1992 Cable Act, the Commission found in its report to Congress that “video programming vendor” includes a television broadcast station: “[T]he term ‘video programming vendor’ refers to *any provider of video programming*, not just cable entities, and therefore *includes a broadcast network*....”⁴⁹ “In making this finding, the Commission explicitly relied on the statute’s reference to ‘video programming vendors,’ without further categorization, to support its interpretation, and explicitly rejected the conclusion that legislative history suggested a more narrow interpretation.”⁵⁰ The Commission affirmed this conclusion in its Final Report.⁵¹

Additionally, in the context of a program carriage complaint proceeding involving the Tennis Channel’s claim that Comcast unlawfully discriminated against it in favor of its affiliated network, the Golf Channel, the Commission’s brief to the U.S. Court of Appeals for the D.C. Circuit stated: “programming vendors, such as broadcast stations...produce video programing.”⁵² Indeed, “the Commission’s statement appears in the section of the brief titled “Statutory and Regulatory Background,” where the Commission informs the court about the definitions of relevant terms in section 616.”⁵³ In the brief, the Commission explains that the term “video programming vendor” includes broadcast stations, citing the definition of “video programming vendor” in the Commission’s regulations.⁵⁴

⁴⁹ Petition for Reconsideration at 8-9 (citing Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Interim Report*, 8 FCC Rcd. 4875, 4889 ¶ 74 (1993) (emphasis added). This statement came after the Commission’s previous observation that “it is possible that Section 616 may apply separately to retransmission consent agreements.” Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, *Report and Order*, 8 FCC Rcd. 2965, 3006 n.452 (1993).

⁵⁰ Petition for Reconsideration at 9.

⁵¹ *Id.* (citing Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Final Report*, 9 FCC Rcd. 3440, 3442 ¶ 3 (1993)).

⁵² *Id.* at 9-10 (citing Brief for Respondents, *Tennis Channel, Inc. v. FCC*, No. 15-1067, 2016 WL 3606323, at 4 (Oct. 21, 2015)); *see* Complaint ¶ 9; Reply ¶ 14 n.4.

⁵³ Petition for Reconsideration at 10.

⁵⁴ *Id.* (“Indeed, the Commission did not provide the court with a summary of prior Commission interpretations, but rather it accurately described the unambiguous, statutory definition of a term central to the case before the court.”).

The EstrellaTV Feed is Delivered in an Identical Manner as Cable Network Feeds are Delivered

There is no basis for distinguishing the EstrellaTV feed for which LBI sought distribution by and compensation from Comcast in the broadcast areas from the one in the white areas.⁵⁵ The EstrellaTV feeds in both the broadcast and the white areas contain identical video programming. In many cases, the distribution method for EstrellaTV's programming to MVPDs for distribution in both its broadcast and white areas, a C-band satellite, is also identical. EstrellaTV was also similarly situated to a cable network when it negotiated for EstrellaTV distribution in both the broadcast and the white areas. Indeed, LBI contends that "[o]nce a full power TV broadcaster elects retransmission consent in lieu of must carry, it is identically situated to cable-only channels seeking distribution by an MVPD."⁵⁶ And thus, like cable-only channels, it qualifies as a video programming vendor. In addition, LBI does not have any must-carry rights in the white areas, analogous to cable-only video programming vendors and not broadcasters.

i. Is the service LBI provides to Comcast in white areas akin to the service that a cable network provides to MVPDs in such areas?

Response: Yes, the service LBI seeks to provide to Comcast (and provides to other MVPDs) is the same service national networks like Telemundo, NBC Universo, CNN and others provide. For example, LBI provides two minutes per half hour for the MVPDs to insert advertising, which is industry standard among cable networks and MVPDs. This is true in LBI's broadcast areas as well as the white areas.

EstrellaTV's Method of Programming Distribution is Identical to Telemundo's

EstrellaTV's method of distribution is identical to Telemundo's. Like EstrellaTV, Telemundo's programming is distributed by O&O broadcast stations, broadcast affiliates, and by MVPDs in white areas, where there is no broadcast signal.⁵⁷ Telemundo has [REDACTED] O&O broadcast stations and [REDACTED] affiliate broadcast stations. Telemundo also is distributed in [REDACTED] white area markets.

⁵⁵ See Complaint ¶ 37 ("Specifically, LBI sought from Comcast distribution and compensation that would parallel Telemundo's [carriage]. . . .").

⁵⁶ *Id.* ¶ 9 n.11.

⁵⁷ *Id.* ¶ 37 ("Specifically, LBI sought from Comcast . . . carriage and compensation for all Estrella TV O&O stations . . . carriage in markets where non-owned Estrella TV broadcast affiliates not otherwise carried by Comcast operate . . . and Estrella TV carriage and compensation in "white areas," markets where there is neither an Estrella TV O&O nor an Estrella TV affiliate. . . .").

Exhibit 3 to this filing details carriage of Telemundo by market, including type of distribution and whether Telemundo’s feed is carried by AT&T, Comcast, Charter, DIRECTV, Dish Network or Verizon.⁵⁸ Telemundo is currently distributed to the following number of subscribers on Comcast and Charter in the markets with a Telemundo O&O broadcast station, an affiliate broadcast station, and white areas.

Telemundo Subscribers by MVPD⁵⁹			
MVPD	O&O Station Broadcast Areas	Affiliate Station Broadcast Areas	White Areas
Comcast			
Charter			

EstrellaTV and Telemundo are distributed in many of the same markets.

By far, however, white areas represent most of the markets they provide programming.

⁵⁸ These subscriber statistics were taken from SNL Kagan’s Subscriber by Network database. See Package Subscribers by Network, SNL KAGAN, <https://www.snl.com/web/client?auth=inherit#industry/mediaCensusWrapper?ReportID=ec28bb11-7386-4081-9ad0-1eb6542361b9> (Set “Network” to “Telemundo” and “Telemundo (Sat Direct)” and “Package Type” to “Buy Through”).

⁵⁹ *Id.*



Given EstrellaTV's greater dependence on the white areas, it is even more akin to cable programming than Telemundo.

EstrellaTV Provides Identical Programming Nationally

As with other cable networks, the EstrellaTV programming LBI provides is identical in all white areas and all of its O&O territories except in certain markets where there are insertions of local news programming and advertisements.

Like Cable Networks, LBI Has No Must-Carry Rights in the White Areas

Like cable networks, LBI lacks must-carry rights in the white areas, and it cannot receive distribution of its programming unless and until an MVPD elects to do so.⁶⁰ Absent availability of section 616's protections, LBI and other programmers operating in white areas and broadcast areas through non-full power stations would have no remedy against MVPD discrimination on the basis of affiliation.

ii. If so, what aspects of the record, if any, explain this?

Response: As cited above, LBI's contentions are supported by statements in at least thirteen paragraphs of LBI's pleadings in this proceeding.⁶¹

b. Does LBI provide video programming that is similarly situated to video programming provided by Comcast-affiliated networks in white areas? See 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i).

Response: Yes. In fact, EstrellaTV is almost exactly the same as Telemundo except for Telemundo's affiliation with Comcast.

⁶⁰ Reply ¶ 18 n.11 ("Must carry rights confer neither rights to distribution beyond the station exercising the rights nor any rights to compensation.").

⁶¹ Complaint ¶¶ 4, 7, 9, 37; Reply ¶¶ 14 n.4, 15, 18 n.11; Petition for Reconsideration at 4, 8-12.

Specifically, EstrellaTV provides nearly identical programming in its broadcast and white areas. The variations consist of local news programming that may be inserted in certain markets as well as interstitial advertisements by the MVPD, which is standard industry practice.⁶² Telemundo’s video programming is similar in its broadcast and white area markets.

EstrellaTV is Similarly Situated to Telemundo

“Estrella TV ‘provides video programming that is similarly situated to video programming provided by’ Telemundo and NBC Universo, ‘based on a combination of factors,’ including genre, ratings, and target audience, advertisers, and programming.”⁶³ All three networks are general interest, Spanish language networks airing overlapping content.⁶⁴ “Telemundo and Estrella TV each offers a closely comparable mix of programming that includes news, sports, reality, talk, drama, and comedy programming targeting the same audience and advertisers.”⁶⁵ And “NBC Universo offers a programming mix similar to Telemundo and Estrella TV, but without news.”⁶⁶

Same Target Audience

EstrellaTV’s target audience is also similarly situated to those of Telemundo and NBC Universo, based on gender, education, age and family size.⁶⁷ All three stations target “Spanish Dominant homes,” with equivalent education levels (high school and college graduates), families with one

⁶² See, e.g., Complaint ¶¶ 31–33 (discussing EstrellaTV’s news programming, and noting that the news coverage in Los Angeles is more expansive than the other markets).

⁶³ *Id.* ¶ 24 n.41.

⁶⁴ *Id.* ¶ 24 (“That is: (i) all three networks are Spanish language; (ii) Telemundo and Estrella TV each offers a closely comparable mix of programming that includes news, sports, reality, talk, drama, and comedy programming targeting the same audience and advertisers; and (iii) NBC Universo offers a programming mix similar to Telemundo and Estrella TV, but without news.”); Reply ¶¶ 59 (“Estrella TV, Telemundo, and NBC Universo, are general interest Spanish-language networks airing a constantly evolving mix of substantially overlapping broadly defined programming genres to target the same U.S. Hispanic viewer pool in a fiercely competitive marketplace.”), 62 (“Estrella TV, Telemundo, and NBC Universo are all similarly situated general interest, mass appeal Spanish language networks which compete for viewers’ attention and allegiance with evolving and differing mixes of largely overlapping program genres.”).

⁶⁵ Complaint ¶ 24.

⁶⁶ *Id.*

⁶⁷ *Id.*, Exh. 12.

or more children, and audiences within the 18-54 age range.⁶⁸ Telemundo and EstrellaTV, in fact, have the same median aged viewer (i.e., 43 years old), while NBC Universo's median viewer is slightly younger (i.e. 35 years old).⁶⁹ These stations each have a similar split in their male/female viewer ratio. EstrellaTV's audience is 50% male and 50% female.⁷⁰ Telemundo's audience is 41% female and 59% male, while NBC Universo's audience is 61% male and 39% female.⁷¹

Common Advertisers

And EstrellaTV, Telemundo and NBC Universo share many large advertisers, including MetroPCS, Ford, Mars, AT&T, Anheuser Busch, Colgate, Clorox, Constellation Brands, Dish, L'Oréal, General Motors, Procter and Gamble, Miller Coors, and Samsung.⁷² These commonalities are consistent whether EstrellaTV is provided in broadcast or white areas.

Distribution by Unaffiliated MVPDs

Additionally, when allowed to compete fairly, "Estrella TV enjoys distribution comparable to that of Telemundo and NBC Universo" and competes with demonstrable success against them.⁷³ EstrellaTV is similarly situated with Comcast's affiliated, Spanish-language networks based on ratings. For example, EstrellaTV substantially outperformed NBC Universo based upon national Spanish-language TV Prime Time Ratings for the May and November sweeps periods.⁷⁴ LBI

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* ¶ 25 ("Within the U.S. Spanish language video universe, in markets where the playing field is level, namely where Estrella TV enjoys distribution comparable to that of Telemundo and NBC Universo, Estrella TV programming competes with demonstrable success against the Hispanic Networks in general and the two Comcast-owned Spanish language networks in particular. In such markets, Estrella TV also substantially outperforms the large majority of its other Spanish language competitors.").

⁷⁴ *See id.* ¶ 34 ("That is, again consulting data reflecting live plus same day viewership during the 7 p.m. to 11 p.m. M-F daypart within the adult 25-54 demographic, Estrella TV registered [REDACTED] Nielsen impressions (viewers) during the May 2015 sweeps across the United States, nearly [REDACTED] better than NBC Universo's [REDACTED] impressions (viewers). During the November 2015 national sweeps, again holding all of these metrics steady, Estrella TV generated [REDACTED] impressions

(Continued...)

also provided substantial ratings data demonstrating that it is similarly situated to Telemundo based upon ratings in its broadcast areas.⁷⁵

Moreover, EstrellaTV, Telemundo, and NBC Universo are similarly distributed by Charter, the second largest cable operator behind Comcast. As noted above, EstrellaTV and Telemundo both own and operate broadcast stations in [REDACTED] major markets, and distribute their programming through affiliate broadcast stations in [REDACTED] of the same markets. Further, they both distribute their programming through either an O&O or affiliate broadcast station in [REDACTED] other markets: [REDACTED]

[REDACTED] Unlike with Comcast, EstrellaTV, Telemundo, and NBC Universo receive similar distribution on Charter in these markets:

Subscribers in Overlapping Broadcast Areas			
MVPD	EstrellaTV ⁷⁶	Telemundo ⁷⁷	NBC Universo ⁷⁸
Comcast	[REDACTED]	[REDACTED]	[REDACTED]
Charter ⁷⁹	[REDACTED]	[REDACTED]	[REDACTED]

compared to NBC Universo's [REDACTED] a differential of nearly [REDACTED] in Estrella TV's favor."), Exh. 18.

⁷⁵ See *id.* ¶¶ 28-33 ("Recent Nielsen ratings for the Los Angeles market evidence the broad popularity and appeal of Estrella TV programming, as carried on LBI O&O KRCA(TV). They show that KRCA's live plus same-day, Monday-Friday, 7-11 p.m. average rating in the key adults 25-54 demographic during the November 2015 sweeps period was [REDACTED]

⁷⁶ See Package Subscribers by Network, SNL KAGAN, <https://www.snl.com/web/client?auth=inherit#industry/mediaCensusWrapper?ReportID=ec28bb11-7386-4081-9ad0-1eb6542361b9> (Set "Network" to "Estrella TV" and "Package Type" to "Buy Through").

⁷⁷ See *id.* (Set "Network" to "Telemundo" and "Telemundo (Sat Direct)" and "Package Type" to "Buy Through").

⁷⁸ See *id.* (Set "Network" to "NBC Universo" and "Package Type" to "Buy Through").

⁷⁹ As noted in the Complaint, [REDACTED]

(Continued...)

Similar “White Area” Distribution

Distribution of EstrellaTV on Charter is also similar to that of Telemundo and NBC Universo in the white areas where both Telemundo and Estrella are distributed as cable networks. There are [REDACTED] such markets, including larger markets such as [REDACTED]

Unlike with Comcast, EstrellaTV and Telemundo receive similar distribution on Charter in white area markets, and EstrellaTV is more widely distributed than Comcast-owned NBC Universo in Charter white areas:

Subscribers in Overlapping White Areas			
MVPD	EstrellaTV ⁸⁰	Telemundo ⁸¹	NBC Universo ⁸²
Comcast	[REDACTED]	[REDACTED]	[REDACTED]
Charter ⁸³	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED] Time Warner
Cable and Charter Communications are now both part of Charter.

⁸⁰ See Package Subscribers by Network, SNL KAGAN, <https://www.snl.com/web/client?auth=inherit#industry/mediaCensusWrapper?ReportID=ec28bb11-7386-4081-9ad0-1eb6542361b9> (Set “Network” to “Estrella TV” and “Package Type” to “Buy Through”).

⁸¹ See *id.* (Set “Network” to “Telemundo” and “Telemundo (Sat Direct)” and “Package Type” to “Buy Through”).

⁸² See *id.* (Set “Network” to “NBC Universo” and “Package Type” to “Buy Through”).

⁸³ As noted in the Complaint, Time Warner Cable provided significant white area coverage in [REDACTED]

- c. Has Comcast treated EstrellaTV differently than its affiliated networks on the basis of affiliation or non-affiliation with respect to the selection, terms, or conditions for carriage in white areas? See 47 CFR § 76.1302(d)(3)(iii)(B)(1), (d)(3)(iii)(B)(1)(ii).**

Response: Yes. [REDACTED]

[REDACTED] Comcast has completely rejected carriage of EstrellaTV in those areas. And it has done so on the basis of affiliation or non-affiliation with respect to the selection, terms, or conditions for white area carriage.

Comcast broadly distributes Telemundo to [REDACTED] of its subscribers.⁸⁴ Comcast distributes Telemundo in all of the Telemundo O&O and affiliate markets it serves. Comcast carries EstrellaTV, on the other hand, in only three EstrellaTV O&O markets. In New York and Chicago, where EstrellaTV has only low power stations, the carriage contracts were secured by legacy owner Tribune.⁸⁵ In Miami, carriage is currently provided through an affiliate station, and not LBI's O&O station.⁸⁶ And in each of the handful of affiliate station markets where Comcast carries EstrellaTV, it only does so because of those affiliates' leverage to secure package deals.⁸⁷ Even so, the total distribution of EstrellaTV to less than [REDACTED] Comcast subscribers is [REDACTED] of the distribution that affiliated Telemundo receives.⁸⁸ These ratings show that EstrellaTV

⁸⁴ Reply ¶ 38 [REDACTED]

⁸⁵ Complaint ¶ 69 (“In New York City and Chicago, Comcast has for now agreed only to continue (not to launch anew) heritage carriage of Estrella TV multicasts that originated at a time when the Tribune Company was an Estrella TV affiliate and Tribune stations WPIX-TV (NYC) and WGN-TV (Chicago) passed through carriage of Estrella TV.”); Reply ¶ 38 n.38 (“As to legacy (formerly Tribune) Estrella TV carriage in New York and Chicago, that carriage of LBI low power stations has been severely restricted to more narrowly distributed, standard definition tiers And carriage of multicasts of large Estrella TV affiliates is due to those affiliates’ leverage to secure carriage as part of package deals.”).

⁸⁶ Complaint, Exh. 3.

⁸⁷ Reply ¶ 38 n.38 (“And carriage of multicasts of large Estrella TV affiliates is due to those affiliates’ leverage to secure carriage as part of package deals.”).

⁸⁸ Complaint ¶ 68 (“Comcast has made inflated claims about its alleged beneficent voluntary carriage of Estrella TV LPTV O&O stations in New York City and Chicago, and Comcast’s distribution of certain non-O&O Estrella TV affiliates – to an aggregate of approximately

(Continued...)

competes effectively against Telemundo in markets where EstrellaTV has competitive distribution.

[REDACTED]

[REDACTED] EstrellaTV, on the other hand, reaches no Comcast subscribers in these markets. Telemundo also has an affiliate broadcast station in [REDACTED] additional markets that are EstrellaTV white areas, where it receives distribution from Comcast, but where EstrellaTV does not.

[REDACTED]

[REDACTED]

[REDACTED] subscribers . . .”), Exh. 21 (a map comparing the distribution of EstrellaTV and Telemundo by Comcast); Reply ¶ 38.

⁸⁹ Reply ¶ 6 [REDACTED]

[REDACTED]

⁹⁰ *Id.*

[REDACTED]

LBI sought from Comcast distribution and compensation, in both its broadcast and white areas, which would parallel Telemundo's distribution and compensation.⁹³ From the beginning, Comcast rejected LBI's attempt to obtain this fair carriage and refused to engage "in any bona fide, legitimate discussion of the business merits for fair Comcast distribution of Estrella TV."⁹⁴ Comcast's rejection of EstrellaTV in the white areas "was comprehensive," "encompass[ing] the selection, terms, and conditions of carriage of Estrella TV programming."⁹⁵ Comcast's decision further rejected substantial evidence of EstrellaTV's merits, including Nielsen ratings data and data showing that EstrellaTV's performance in national ratings substantially exceed NBC Universo's despite the national distribution advantages NBC Universo enjoys over EstrellaTV.⁹⁶

⁹¹ *Id.*

⁹² *Id.*

⁹³ Complaint ¶ 37 ("Specifically, LBI sought from Comcast . . . carriage and compensation for all Estrella TV O&O stations . . . carriage in markets where non-owned Estrella TV broadcast affiliates not otherwise carried by Comcast operate . . . and Estrella TV carriage and compensation in "white areas," markets where there is neither an Estrella TV O&O nor an Estrella TV affiliate. . . .").

⁹⁴ *Id.* ¶¶ 38 ("From the beginning of the LBI/Comcast discussions until their conclusion in October 2015 . . . Comcast essentially rejected the notion of a fair expansion of its carriage and compensation of Estrella TV programming beyond the uncompensated Houston/Denver/Salt Lake City Carriage Comcast had provided Estrella TV under the FCC's broadcast must-carry rules."), 41 ("Not only did Comcast refuse to engage Estrella TV in any bona fide, legitimate discussion of the business merits of fair Comcast distribution of Estrella TV, but in an email . . . Comcast compounded the problem by making a demand that Estrella TV surrender its digital rights in Estrella TV programming in return for Comcast carriage of that programming.").

⁹⁵ *Id.* ¶ 40.

⁹⁶ Reply ¶ 36 ("From the beginning of the negotiations in this proceeding to the present day, LBI has presented Comcast with compelling evidence of the positive relative value of Estrella TV programming. That evidence includes: Nielsen data drawn from a vital demographic group as measured in weekday evening prime time during May and November 2015 Nielsen sweeps periods, showing that when given fair and competitive MVPD distribution in large markets like Los Angeles and Dallas, the Nielsen ratings of Estrella TV programming exceed or closely rival those of Telemundo; Nielsen data drawn from the Houston and Denver markets that reinforce these conclusions; a showing that Estrella TV's prime time daily newscasts consistently generate high Nielsen ratings; and data showing that Estrella TV's performance in national ratings

(Continued...)

The rejection was also made on the basis of LBI’s non-affiliation with Comcast, and not for any legitimate business reason.⁹⁷ Instead, the decision was designed to benefit Telemundo and NBC Universo by “suppressing, perhaps even ultimately foreclosing, the competitive threat posed by Estrella TV.”⁹⁸ First, the decision stands in stark contrast to the decisions of other MVPDs that do not hold an ownership interest in programming or a network that competes with EstrellaTV.⁹⁹ As detailed above, these MVPDs broadly carry EstrellaTV, and also compensate LBI for such carriage.¹⁰⁰

Second, Comcast has given broader distribution to other, lower-rated, non-Comcast-affiliated channels that target a Hispanic audience and do not pose a competitive threat to Comcast’s affiliated networks.¹⁰¹ Since the *Comcast-NBCU Order*, Comcast has added to its lineup:

- The Hispanic Information & Telecommunications Network - HITN (non-commercial Spanish language educational programming)
- LA TV (bilingual mix of original and imported music, talk and variety series aimed at Hispanic and Latino American teenagers and young adults between the ages of 12 and 34)

substantially exceed NBC Universo’s despite the national distribution advantages NBC Universo enjoys over Estrella TV.”).

⁹⁷ Complaint ¶ 53 (“Comcast’s choices in this case can be identified as prohibited discrimination, not legitimate business decisions, in multiple ways.”); Reply ¶¶ 54-55 (“The disparate treatment of Estrella TV and NBC Universo, among other showings made by LBI, also helps to demonstrate that Comcast’s claims of reasonable business purpose are ‘pretextual cover for some deeper discriminatory purpose.’”).

⁹⁸ Complaint ¶ 47.

⁹⁹ *Id.* ¶ 55 (“On one side of the chasm stand a plethora of sophisticated MVPDs and broadcast companies which have made the decision to distribute Estrella TV programming, including but not limited to: Time Warner, Charter, AT&T/DIRECTV, DISH, Verizon, Cablevision, Mediacom, Cox, Nexstar, Sinclair, Tegna, and Hearst. Such companies share a common characteristic – none holds an ownership interest in a programming channel or network that competes with Estrella TV.”); Reply ¶ 51 n.58 (“Comcast’s continued insistence that Estrella TV’s programming lacks value puts Comcast at odds with a plethora of non-conflicted broadcast affiliates and MVPDs that distribute Estrella TV”).

¹⁰⁰ Complaint ¶ 55.

¹⁰¹ *Id.* ¶ 55; Reply ¶ 51 n.58.

- NuvoTV (formerly SiTV, English-language general entertainment programming directed toward bicultural Latinos)
- BabyFirst Americas (designed for families with infants and young children and their parents with a focus on early development)
- beIN SPORT Espanol (sports programming, principally soccer from Europe and South America)
- CentroAmerica TV (general entertainment channel featuring content from Central America with foreign news, series, comedies and live soccer)
- LAS - Latin American Sports (coverage of events and original productions from Puerto Rico, Cuba and Mexico including baseball, soccer, basketball, volleyball, boxing and Mexican rodeo)
- Pasiones (features Spanish language novelas from North and South America)
- Vme Kids (Spanish language programming for children ages 2-6)
- El Rey (general entertainment network in English for Latino and general audiences that includes an emphasis on martial arts movies, and seventies and eighties era off-network reruns, with a mix of reality, scripted and animated series, music, comedy, and sports programming).¹⁰²

Unlike EstrellaTV, none of these networks (1) offers an appreciable amount of original programming produced in the United States; (2) provides any original news content, much less highly popular prime time news programming; nor (3) earns meaningful ratings in the United States Spanish language video marketplace,¹⁰³ and “do not come close to matching Estrella TV’s ratings or posing EstrellaTV’s competitive threat to Telemundo and NBC Universo.”¹⁰⁴ In fact, the majority of these channels are either bilingual or English language channels, and have no Nielsen ratings at all. EstrellaTV, like Telemundo and NBC Universo, is a Spanish language network.

¹⁰² Complaint ¶ 48.

¹⁰³ Reply ¶ 51 n.58 (“[I]n lieu of Estrella TV, Comcast distributes a package of Hispanic Channel Additions that do not come close to matching Estrella TV’s ratings or posing Estrella TV’s competitive threat to Telemundo and NBC Universo”); *see* Complaint ¶ 50 (“In other words, unlike Estrella TV, none of these Post-Merger Hispanic Network Additions offers anything comparable to the viewer value Estrella TV provides nor, insofar as LBI is able to determine, does any Post-Merger Hispanic Network Addition offer any meaningful competitive threat to Comcast-owned Telemundo and NBC Universo.”).

¹⁰⁴ Reply ¶ 51 n.58.

Third, Comcast gives its affiliated networks starkly better treatment than EstrellaTV, without a legitimate business reason. During the same period when Comcast refused to carry EstrellaTV, Comcast rebranded NBC Universo and granted it wide carriage and support across Comcast's national platform without any business justification.¹⁰⁵ Comcast's decision was made despite EstrellaTV's viewership levels for all demographics exceeding those of NBC Universo by ¹⁰⁶ and with knowledge ¹⁰⁷

Comcast's decision to only makes sense as a scheme to advance the prospects of a far less successful owned network on the basis of affiliation, while simultaneously hamstringing the marketplace prospects of EstrellaTV, a direct competitive threat.¹⁰⁸

d. Has Comcast's conduct had the effect of unreasonably restraining the ability of EstrellaTV to compete fairly? See 47 CFR § 76.1302(d)(3)(iii)(A).

Response: Under the *Comcast-NBCU Order*, LBI does not have to "prove that it was

¹⁰⁵ Complaint ¶ 61 ("Rather than work out a reasonable business deal with LBI consistent with its obligations under Section 616, the Carriage Rules, and the Merger Conditions, as well as the many promises it made at the time of the NBCU merger, Comcast gave LBI the cold shoulder and focused instead on the launch in that same month of its own rebranded NBC Universo, granting NBC Universo wide carriage and support across Comcast's huge national MVPD platform. In other words, Comcast moved to give affiliated, rebranded NBC Universo every chance to succeed in the hotly competitive Spanish language video marketplace at the very same time it was moving to harm, if not foreclose, an unaffiliated competitor with a proven track record of ratings success (Estrella TV) by denying it fair carriage and compensation.").

¹⁰⁶ Reply ¶ 6

¹⁰⁷ *Id.* ¶ 44

¹⁰⁸ *Id.* ¶ 46 ("Instead, Comcast's decision to only makes sense as designed to advance the prospects of a far less successful owned network on the basis of affiliation, while simultaneously hamstringing the marketplace prospects of Estrella TV, a direct competitive threat.").

unreasonably restrained from competing, as it would under [the Commission’s] program carriage rules.”¹⁰⁹ However, LBI did make the showing that Comcast’s behavior had the effect of unreasonably restraining the ability of EstrellaTV to compete fairly.

LBI was clear: “MVPD carriage is critical to the ability of a programming network like Estrella TV to compete in today’s video marketplace by helping it reach viewers in all markets, including not only markets in which the programming network has O&Os and affiliates, but markets in which the network has no over-the-air presence (so-called white areas).”¹¹⁰ “Comcast’s unlawful suppression of Estrella TV’s ability to compete creates an unfortunate array of collateral damage, which includes, but is not limited to, harming Estrella TV’s ability to continue to produce unique programming; foreclosing access by Estrella TV advertisers to Comcast markets; and depriving consumers of programming they want to watch, including but not limited to popular news programming that provides substantial public interest benefits.”¹¹¹ [REDACTED]

[REDACTED] The effect of unreasonably restraining the ability of EstrellaTV to compete fairly applies similarly in both EstrellaTV’s broadcast and white areas.

Comcast’s conduct is exactly the kind of conduct that Section 616 was intended to prevent. Congress wanted to protect businesses such as LBI that are small, independent and reliant upon discretionary “white area” coverage since such entities cannot necessarily afford to acquire full power TV stations (as Comcast did with NBC and Telemundo) for must carry.

¹⁰⁹ *Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121.

¹¹⁰ Reply ¶ 16 n.8.

¹¹¹ Complaint ¶ 63 n.89.

¹¹² Expert Report of Harold W. Furchtgott-Roth Analysis ¶¶ 66-67 [REDACTED]

¹¹³ *Id.* ¶¶ 60-65 [REDACTED]

- 3. With regard to LBI’s discrimination claim as it applies to white areas, what relief is LBI seeking? For example, if the Bureau were to find that LBI is a “video programming vendor” in white areas (while reaffirming its finding that LBI lacks standing to bring a complaint with respect to markets where it is acting as a broadcaster), is LBI seeking compelled carriage of EstrellaTV only in such areas? If so, what aspects of the record, if any, clarify that the relief sought is so limited?**

Response: LBI seeks an order ordering Comcast to distribute and compensate EstrellaTV on terms comparable to the terms on which Comcast distributes and compensates Telemundo or on such other equitable terms as the Commission may determine.¹¹⁴ If the Commission finds that Comcast has unlawfully discriminated against EstrellaTV relative to Telemundo and NBC Universo, the remedy should include carriage on similar terms as Comcast treats Telemundo and NBC Universo, which means carriage in white areas and broadcast markets on the same terms and conditions, including identical per sub fee, tier placement, and signal quality (e.g., where Telemundo is carried in HD, Comcast would be required to carry EstrellaTV in HD), as Comcast gives to Telemundo for carriage in such areas. This remedy request is consistent with LBI’s broad request for relief, and would constitute an equitable remedy in light of any finding that LBI is not a video programming vendor in markets where it operates as a broadcaster.

¹¹⁴ Complaint ¶ 83 (requesting the Commission order Comcast to carry and compensate EstrellaTV “wherever (i.e., in all DMAs served by Comcast) and however (e.g., standard definition/high definition/carriage in a particular neighborhood, etc.) Comcast carries Telemundo”); Reply ¶ 58 (“In the Complaint in this case, LBI has asked for the relief to which it believes it is entitled (namely parity with Telemundo), based on precedent establishing that unaffiliated VPVs which compete with vertically integrated MVPDs that ‘have the incentive and ability to favor affiliated programmers’ ‘may suffer harm to the extent that [the VPVs] do not receive such favorable terms.’”). LBI also continues to request that the Commission: (1) find that Comcast violated Section 616 of the Communications Act, as amended, section 76.1301 of the Commission’s rules, and the *Comcast-NBCU Merger Order* and conditions; (2) enjoin Comcast from further program carriage discrimination against LBI and EstrellaTV; (3) take appropriate enforcement action against Comcast for its violations of law; and (4) order any other relief that the Commission may deem appropriate. Complaint at 51-52.

- 4. The Bureau’s August 2016 Memorandum Opinion and Order stated, among other things, that LBI is free to bring a program carriage complaint relating to its provision of non-broadcast programming. Do the parties agree that their September 2016 tolling agreement would toll the statute of limitations with respect to any additional complaints arising under the facts of this case, including a new complaint alleging program carriage discrimination in white areas?**

Response: Yes. In the event that the Bureau disagrees with LBI’s continued position that it has demonstrated a *prima facie* case of unlawful discrimination by Comcast in the white areas in violation of section 76.1302(d)(3)(iii) of the Commission’s rules, the September 21, 2016 tolling agreement between LBI and Comcast (“LBI-Comcast Tolling Agreement”) would toll the statute of limitations with respect to a new complaint alleging program carriage discrimination in white areas. The LBI-Comcast Tolling Agreement tolls “the running of any statute of limitations applicable to any claims” by LBI or its affiliates in “one or more additional complaints against Comcast in connection with the facts underlying this proceeding.”¹¹⁵ Comcast’s discrimination against EstrellaTV in the white areas is a fact underlying this proceeding.¹¹⁶ The LBI-Comcast Tolling Agreement gives LBI thirty days to file a complaint from the date on which the Commission enters a decision on the LBI petition. This gives LBI thirty days after a decision to file a new complaint alleging program carriage discrimination in white areas as LBI would have been able to file such a complaint under the applicable statute of limitations on September 21, 2016 under Section 76.1302(h) of the Commission’s rules, which gives parties one year from an impasse in negotiations to file (negotiations between Comcast and LBI reached an impasse in October 2015).

Respectfully submitted,

s/Markham C. Erickson

Markham C. Erickson

*Counsel for Liberman Broadcasting, Inc.
and LBI Media, Inc.*

¹¹⁵ Tolling Agreement at 2.

¹¹⁶ See Complaint ¶ 37 (LBI sought, and Comcast refused to provide, carriage and compensation for distribution of EstrellaTV in the white areas).

Ms. Marlene H. Dortch
May 15, 2017
Page 30



PUBLIC VERSION – REDACTED

cc (via email): MaryBeth Murphy (MB)
Martha Heller (MB)
Raelynn Remy (MB)
Susan Aaron (OGC)
Michael Hurwitz (Willkie Farr & Gallagher LLP)
Jay Cohen (Paul, Weiss, Rifkind, Wharton & Garrison LLP)

EXHIBIT 1

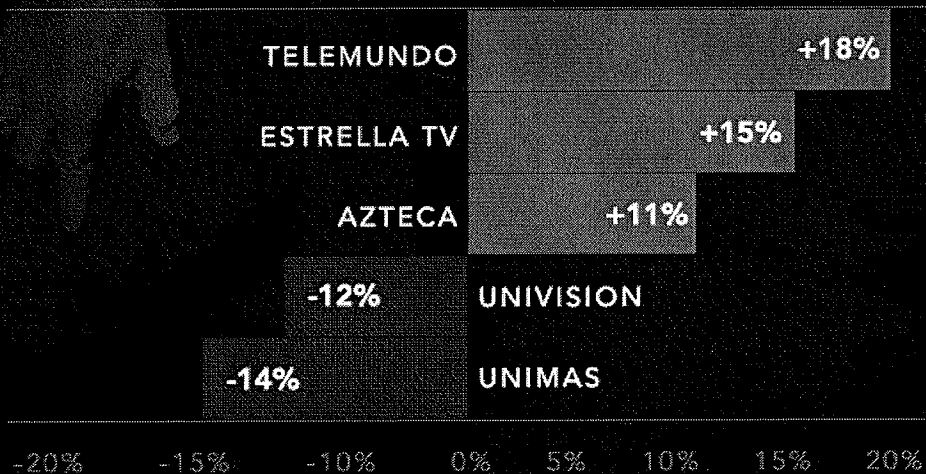
TELEMUNDO

LEADING GROWTH IN
THE SPANISH-LANGUAGE
MARKETPLACE

SHIFT HAPPENS

RAFAEL AMAYA
EL SEÑOR DE LOS CIELOS

SEASON-TO-SEASON GROWTH
(ADULTS 18-49 C3 000S)



NBCU HISPANIC



UNEQUALED
NBCU
NBCUniversal

Source: TVROCS, Nielsen, Season-to-season comparison, 09/19/2016 - 03/26/2017, 09/21/2015 - 03/27/2016, A18-49 (000), Comm Live + 3, pgm strict daypart



View in web browser

This message was sent to clewis@lbimedia.com

EXHIBIT 2

[Redacted in its Entirety from Public Version]

EXHIBIT 3

[Redacted in its Entirety from Public Version]